UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	Civil Action No. 15-535 (RBW)

ORDER

The plaintiff, a former student-athlete, filed several civil actions in the Superior Court of the District of Columbia ("Superior Court"), which were consolidated, against the defendants, the National Collegiate Athletic Association, the Patriot League, American University, the Maryland Sports Medicine Center, David L. Higgins, M.D., P.C., David L. Higgins, M.D., and Aaron Williams, D.O. ("Dr. Williams"), alleging various causes of action stemming from the defendants' failure to provide her with proper medical care after she allegedly sustained a head injury during a field hockey game in September 2011. See Notice of Removal of a Civil Action ("Removal Notice") ¶¶ 1-3; see generally Removal Notice, Exhibit ("Ex.") B (Complaint ("Compl.")). Thereafter, pursuant to the Westfall Act, 28 U.S.C. § 2679 (2012),[1] Dr. Williams received a certification from the United States that he was "acting within the scope of his employment as an employee of the United States at the time of the . . . [allegations] in the [c]omplaint." Removal Notice ¶ 4. This certification statutorily substituted the United States for

[1] The Federal Employees Liability Reform and Tort Compensation Act of 1988 is commonly referred to as the "Westfall Act." E.g., Kelley v. FBI, 67 F. Supp. 3d 240, 275 (D.D.C. 2014).

Dr. Williams as a defendant, id. ¶ 5 (citing 28 U.S.C. § 2679(d)(1)), and the consolidated civil action was removed to this Court by the United States, id. (citing 28 U.S.C. § 2679(d)(2)). Three motions are currently pending before the Court: (1) the Plaintiff's Motion for Remand ("Remand Mot."); (2) the Federal Defendant's Motion to Dismiss ("Fed. Dismiss Mot."); and (3) Defendant The Patriot League's Preliminary Motion to Dismiss ("Patriot League Dismiss Mot."). Upon careful consideration of the parties' submissions,[2] the Court concludes for the reasons that follow that the federal defendant's motion must be granted, rendering the remaining motions moot and compelling remand of this case to the Superior Court.

I. BACKGROUND

A. Statutory Background

The Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." Osborn v. Haley, 549 U.S. 225, 229 (2007). "When a federal employee is sued for wrongful or negligent conduct, the [Westfall] Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" Id. at 229-30 (quoting 28 U.S.C. § 2679(d)(1), (2)). "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." Id. at 230. "The litigation is thereafter governed by the Federal Tort Claims Act." Id. (citation omitted). "If the action commenced in state court, the

[2] In addition to the documents already mentioned, the Court considered the following submissions: (1) the Federal Defendant's Opposition to [the] Plaintiff's Motion for Remand ("Opp'n to Remand Mot."); (2) the Federal Defendant's Notice to the Court of a Recent Decision ("Fed. Notice"); (3) the Plaintiff's Opposition to [the] Federal Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) or for Summary Judgment ("Opp'n to Fed. Dismiss Mot."); (4) the Federal Defendant's Reply to [the] Plaintiff's Opposition to [the] Federal Defendant's Motion to Dismiss ("Fed. Dismiss Reply"); (5) the Line Regarding Defendant Patriot League's Motion to Dismiss ("Line I"); and (6) the Line Regarding Preliminary Motions to Dismiss ("Line II").

case is to be removed to a federal district court, and the certification remains 'conclusive for purposes of removal.'" Id. (alteration and ellipses omitted) (citing 28 U.S.C. § 2679(d)(2)).

B. The Plaintiff

In 2011, the plaintiff was a junior-year student athlete at American University here in Washington, D.C. See Removal Notice, Ex. B (Compl.) ¶¶ 3, 97. She played field hockey for the university, see id. ¶ 97, and in September of that year, the plaintiff asserts that she "was hit in the head during a field hockey game between American University and Richmond University," id. ¶ 98. Subsequent to that hit, she allegedly began experiencing symptoms of a concussion, but continued participating in field hockey practices and games, see id. ¶¶ 99-122, as she was "[not] advised to sit out [practices and games] while her symptoms persisted," id. ¶ 113.[3] Those entities and individuals that allegedly failed to render appropriate medical advice and treatment included Dr. Williams. See id. ¶¶ 115, 195-97, 202-05. According to the plaintiff, this failure has caused her a variety of harms, including monetary damages. Id. ¶¶ 132-36.

C. Dr. Aaron Williams

At the time Dr. Williams rendered healthcare services to the plaintiff, he was a "Commissioned Officer in the United States Army" and was "employed exclusively by the Department of Defense . . . ." Opp'n to Fed. Dismiss Mot., Ex. 4 (Petition of Aaron Williams, D.O. for Judicial Finding and Certification of Scope of Office or Employment ("Williams Pet.")) ¶ 3; see also Remand Mot., Ex. B (Memorandum of Understanding Between the Medical Practice of David L. Higgins, M.D. and the National Capital Consortium ("Memorandum of Understanding")) ¶ 3 ("Trainees who will be trained . . . [according to the Memorandum of

[3] In 2012, the plaintiff contends that she was diagnosed by various healthcare practitioners with post-concussion syndrome. See Removal Notice, Ex. B (Compl.) ¶¶ 117-30, 132.

Understanding] must be either physicians on active duty in the United States military . . . or civil physicians who are full-time employees of the United States government."). He was also "a Fellow of the National Capital Consortium-Dewitt Army Community Hospital Primary Care Sports Medicine Fellowship under the auspices and direction of the Department of Family Medicine at the Uniformed Services University of the Health Sciences."[4] Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) ¶ 6. "At all times during [his] participation in the [Consortium], [he] only received compensation from the Department of Defense . . . ." Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) at Ex. A ¶ 10.

During the time frame relevant to this litigation, there was a Memorandum of Understanding between the Consortium and David L. Higgins, M.D., P.C. ("Higgins Medical Practice"), whereby certain fellows in the Consortium "were assigned to the [Higgins Medical Practice] in order to receive the benefit of training at facilities available to the [Higgins Medical Practice], including American University." Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) ¶ 6; see also Remand Mot., Ex. B (Memorandum of Understanding) ¶ 4 ("It is in the best interest of the Consortium for trainees to use the facilities of the [Higgins Medical Practice] to receive clinical experience. This includes . . . experience obtained through clinical work performed specifically at American University . . . . It is to the benefit of the [Higgins Medical Practice] to receive and use the clinical experience and performance of Consortium trainees."). And pursuant to the Memorandum of Understanding, "Dr. Williams was assigned to . . . [the Higgins Medical Practice] for approximately [one-and-a-half] days per week." Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) ¶ 6; see also Remand Mot., Ex. B (Memorandum of Understanding)

[4] There is no dispute that the National Capital Consortium is an "agency of the Department of Defense." Remand Mot., Ex. B (Memorandum of Understanding) ¶ 1 ("[The Consortium] is an agency of the Department of Defense and is an instrumentality of the United States Government. For purposes of this agreement, all references to the Consortium shall include by implication the United States and all its instrumentalities."). For ease of reference, the Court will hereinafter refer to the National Capital Consortium as the "Consortium."

¶¶ 17-21, 25. The "assignment included physician coverage for specified home athletic events and medical clinics at . . . the American University campus," Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) ¶ 6; see also Remand Mot., Ex. B (Memorandum of Understanding) ¶ 4, as provided for in a separate agreement between the Higgins Medical Practice and American University, Remand Mot., Ex. A. (Professional Services Agreement Medical ("Services Agreement")).

D. The Westfall Act Certification

After the plaintiff initiated her lawsuits, Dr. Williams consulted with the United States Army Legal Services Agency ("Army Legal Agency"), which took the position that he "was not acting within the scope of his office or employment in all instances relevant to the [p]laintiff's [c]omplaint." Opp'n to Fed. Dismiss Mot., Ex. 4 (Williams Pet.) ¶ 15. Despite this position, the plaintiff "made a formal request" to the United States that it "certify that [he], at all times relevant to the [c]omplaint, was an employee of the . . . United States[,] acting within the scope of his employment." Id. The request was granted by the United States Attorney's Office for the District of Columbia after considering the allegations in the complaint.[5] See Removal Notice, Ex. C (Certification ("Westfall Certification")).

[5] Although the Westfall Act confers certification authority on the Attorney General, 28 U.S.C. § 2679(d), the Attorney General has permitted the United States Attorney's Office for the District of Columbia to serve as a proxy, 28 C.F.R. § 15.4(b) (2012) ("The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy.").

II. ANALYSIS

A. Propriety of Westfall Certification

A Westfall Act Certification ("Westfall certification") can be challenged by a plaintiff.[6] See Stokes v. Cross, 327 F.3d 1210, 1213 (D.C. Cir. 2003). Once the plaintiff initiates that challenge, "the certification 'constitutes prima facie evidence that the employee was acting within the scope of his employment.'" Wuterich v. Murtha, 562 F.3d 375, 381 (D.C. Cir. 2009) (alteration omitted) (quoting Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006)). This presumption can only be rebutted by alleging "sufficient facts that, taken as true, would establish that the defendant's actions exceeded the scope of [his] employment." Id. (first alteration omitted) (quoting Stokes, 327 F.3d at 1215). "If [the] plaintiff meets this pleading burden, [the plaintiff] . . . may, if necessary, attain 'limited discovery' to resolve any factual disputes over jurisdiction." Id. (quoting Stokes, 327 F.3d at 1214, 1216). In other words, "there is no right to even limited discovery in a Westfall Act case unless and until a [movant] has made allegations sufficient to rebut the [g]overnment's certification" decision. Id. at 382 (citing Stokes, 327 F.3d at 1215-16). Thus, not every challenge will warrant further inquiry into the scope-of-employment issue.[7] Stokes, 327 F.3d at 1216.

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[6] In addition to contesting the substance of the Westfall certification, the plaintiff argues that the certification was untimely under 28 U.S.C. § 1446(b)(1) (2012). Remand Mot. at 7-8. But that provision does not govern removal of cases from Superior Court to this Court on the basis of a Westfall certification. See 28 U.S.C. § 2679(d)(2) ("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." (emphasis added)). The certification, therefore, was timely.

[7] The Court notes that the plaintiff has not requested any additional discovery regarding the Westfall certification. In any event, the Court would not permit discovery in this case, as the plaintiff has not alleged additional facts or cited any legal authority that would potentially alter the scope of Dr. Williams' employment. She relies almost solely on the language contained in the Memorandum of Understanding in attacking the validity of the Westfall certification, which, as the Court will explain, buttresses the certification. See Remand Mot. at 1-6.

"To determine whether an employee was acting within the scope of his employment under the Westfall Act, courts apply the respondeat superior law of the state in which the alleged tort occurred." Wuterich, 562 F.3d at 383 (citing Wilson v. Libby, 535 F.3d 697, 711 (D.C. Cir. 2008)). The Court is, therefore, permitted to affirm the certification under District of Columbia law, which the parties agree is the applicable law here, if Dr. Williams' conduct:

> (a) [was] of the kind he [was] employed to perform;
> (b) occur[ed] substantially within the authorized time and space limits;
> (c) [was] actuated, at least in part, by a purpose to serve the [the United States government]; and
> (d) if force [was] intentionally used by [him] against another, the use of force [was] not unexpectable by the [United States government].[8]

Id. at 383 (quoting Restatement (Second) of Agency (1958)). "The test for scope of employment is an objective one, based on all the facts and circumstances." Id. (alteration omitted) (quoting Ballenger, 444 F.3d at 663). And, it is to be broadly interpreted. See Harbury v. Hayden, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008) ("Because of the broad scope-of-employment standard in . . . D.C., and because the [Federal Tort Claims Act] and the Westfall Act incorporate the relevant state's test, tort claims against federal government employees often proceed against the Government itself under the [Federal Tort Claims Act] rather than against the individual employees under state law.").

Here, the Court finds that the Westfall certification was proper, and thus Dr. Williams was acting as an employee of the United States government at all relevant times encompassed by the complaint. In providing healthcare services to the plaintiff, Dr. Williams was engaged in the kind of conduct that the Consortium had employed him to perform, and this conduct fell within the time and space authorized by the Memorandum of Understanding between the Consortium

[8] The plaintiff has incorrectly articulated the test for determining the scope of employment in the Westfall certification context. See Remand Mot. at 5.

and the Higgins Medical Practice, see, e.g., Remand Mot., Ex. B (Memorandum of Understanding) ¶ 3 ("The Consortium has established a family medicine/sports medicine fellowship program . . . . The program curriculum requires special clinical training in preparation for board certification of fellows, henceforth referred to as 'trainees' in sports medicine."); id. ¶ 4 ("It is in the best interest of the Consortium for trainees to use the facilities of the [Higgins Medical Practice] to receive clinical experience. This includes . . . experience obtained through clinical work performed specifically at American University . . . . It is to the benefit of the [Higgins Medical Practice] to receive and use the clinical experience and performance of Consortium trainees."); id. ¶ 32 ("While assigned to the [Higgins Medical Practice] and while performing services pursuant to this agreement, [the Consortium] trainees remain employees of the United States performing duties within the course and scope of their federal employment."), as well as the services agreement between the Higgins Medical Practice and American University, see Remand Mot., Ex. A. (Services Agreement). Further, Dr. Williams' conduct was, in significant part, done in furtherance of the Consortium's stated goal of providing him with clinical training through his placement at the Higgins Medical Practice. See Remand Mot., Ex. B (Memorandum of Understanding) ¶¶ 3, 4, 25, 32. It follows that the services he rendered were not unexpected by the Consortium.[9] See, e.g., id. ¶¶ 3, 4.

The plaintiff has failed to rebut the Westfall certification. That Dr. Williams was deemed a member of the Higgins Medical Practice at the times of the alleged tortious conduct, see Remand Mot. at 2; see also Remand Mot., Ex. B (Memorandum of Understanding) ¶ 10 ("The parties agree that trainees will be considered providers or members of the Practice's workforce

[9] Because the Court has now scrutinized the record to assess whether Dr. Williams was properly certified, it is of no moment that the Army Legal Agency initially refused to recommend a Westfall certification to the United States Attorney's Office for the District of Columbia. E.g., Kelley, 67 F. Supp. 3d at 276 n.28 ("[T]he Westfall Act certification . . . [is] subject to de novo judicial review." (citing Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 427-30 (1995))).

while performing duties pursuant to this agreement . . . ."); id. ¶ 11 ("Consortium residents, while training at the [Higgins Medical Practice], will be under the exclusive control and supervision of the [Higgins Medical Practice] . . . ."); id. ¶ 17 ("The Practice . . . , to the extent possible, will treat trainees as if they were members of the Practice's permanent staff." (emphasis added)), does not undermine the Court's decision to sustain the Westfall certification. In performing his tasks as if he were a member of the Higgins Medical Practice, consistent with the terms of the Memorandum of Understanding, Dr. Williams was necessarily acting within the scope of his employment for the Consortium. See, e.g., Remand Mot., Ex. B (Memorandum of Understanding) ¶ 4 ("It is in the best interest of the Consortium for trainees to use the facilities of the [Higgins Medical Practice] to receive clinical experience."); id. ¶ 27 ("The Consortium will ensure compliance with all applicable [Higgins Medical Practice] rules and instructions and those of its physicians."). Thus, Dr. Williams was at bottom an employee of the Consortium, not the Higgins Medical Practice. See, e.g., Lahr v. United States, No. 09-cv-106-TWP, 2010 WL 4386547, at *3 (S.D. Ind. Oct. 28, 2010) (examining written agreement between United States and medical school and finding that the medical student, who allegedly committed medical malpractice, was an employee of the United States for purposes of the lawsuit because the alleged conduct fell "under the focus of responsibility which the written agreement . . . assign[ed] to the [United States]."); Remand Mot., Ex. B (Memorandum of Understanding) ¶ 4 ("It is in the best interest of the Consortium for trainees to use the facilities of the [Higgins Medical Practice] to receive clinical experience. This includes . . . experience obtained through clinical work performed specifically at American University . . . ."); id. ¶ 26 ("The Consortium will provide and maintain accurate personnel records and reports developed during the course of trainees' clinical experience." (emphasis added)); id. ¶ 32 ("While assigned to the [Higgins

Medical Practice] and while performing services pursuant to this agreement, [the Consortium] trainees remain employees of the United States performing duties within the course and scope of their federal employment."); Opp'n to Fed. Dismiss Mot., Ex. 4. (Williams Pet.) at Ex. A ¶ 10 ("At all times during [Dr. Williams'] participation in the [Consortium], [he] only received compensation from the Department of Defense . . . ."); see also M.J. ex rel. Jarvis v. Georgetown Univ. Med. Ctr., 962 F. Supp. 2d 3, 5 (D.D.C. 2013) (no dispute between parties that individual defendant was properly substituted by United States when he was "a Major in the United States Army and [was in the course of] completing a fellowship at Georgetown University Hospital" when alleged conduct occurred), aff'd as modified sub nom. M.J. v. Georgetown Univ. Med. Ctr., No. 13-5321, 2014 WL 1378274 (D.C. Cir. Mar. 25, 2014). Consequently, the Court will substitute the United States as the defendant for Dr. Williams and dismiss the claims brought against him.

B. Propriety of Dismissal and Remand

Despite the Court's substitution ruling, this case cannot be pursued against the United States in this Court at this time. After substitution, the only claims against the United States are those for negligent infliction of emotional distress and medical malpractice, which both seek monetary damages. Removal Notice, Ex. B (Compl.) ¶¶ 169-73, 195-205. But "[t]he [Federal Tort Claims Act] 'requires the plaintiff to file an administrative claim with either the Department of Defense or the appropriate military department before bringing suit' and 'the failure to exhaust administrative remedies is jurisdictional.'"[10] Budik v. Ashley, 36 F. Supp. 3d 132, 140-

[10] Another member of this Court has recently noted that "[t]he Seventh Circuit has abandoned the position that the [Federal Tort Claims Act] exhaustion requirement is jurisdictional, in light of recent Supreme Court decisions 'pressing a stricter distinction between truly jurisdictional rules' and nonjurisdictional 'claim-processing rules.'" Achagzai v. Broad. Bd. of Governors, _ F. Supp. 3d _, _, 2015 WL 3647570, at *2 n.1 (D.D.C. 2015) (quoting Gonzalez v. Thaler, _ U.S. _, _, 132 S. Ct. 641, 648 (2012). Nevertheless, the Judge in Achagzai recognized that this jurisdictional bar "remains [the] binding law in this Circuit." Id. (citation omitted).

41 (D.D.C. 2014) (Walton, J.) (alterations and ellipses omitted) (quoting Ali v. Rumsfeld 649 F.3d 762, 775 (D.C. Cir. 2011), aff'd sub nom. Budik v. United States, No. 14-5102, 2014 WL 6725743 (D.C. Cir. Nov. 12, 2014), cert. denied, 135 S. Ct. 2811 (2015); see also 28 U.S.C. § 2675(a) (2012) ("An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied . . . ."); Moldauer v. Constellation Brands Inc., 87 F. Supp. 3d 148, 155 (D.D.C. 2015) ("To bring suit under the [Federal Tort Claims Act], a plaintiff must first exhaust administrative remedies by presenting his claims to the agencies through '(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim.'" (quoting GAF Corp. v. United States, 818 F.2d 901, 905 (D.C. Cir. 1987))). And here, the plaintiff concedes that she "is still pursuing her administrative remedies . . . ." Opp'n to Fed. Dismiss Mot. at 1; see also id. at 5, 15-16. Therefore, the claims against the United States must be dismissed at this time.

Finally, the claims against the remaining defendants must be remanded to the Superior Court. In J.S.R. ex rel. Rojas Polanco v. Washington Hospital Center Corp., the United States, in its capacity as a defendant, removed the case to this Court on the basis of federal question jurisdiction, and this Court subsequently "dismissed" the United States because the plaintiffs "had failed to exhaust their administrative remedy under the [Federal Tort Claims Act]." 667 F. Supp. 2d 83, 85 (D.D.C. 2009). Having dismissed the case against the United States, the Court reasoned that it "ceased to have subject matter jurisdiction over the case," the other co-defendants having "never removed the case." Id. Thus, like J.S.R., the Court no longer has

jurisdiction over this matter following the dismissal of the United States because none of the other co-defendants here ever sought to remove the consolidated case from Superior Court to this Court.[11]

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Federal Defendant's Motion to Dismiss is **GRANTED**. It is further

ORDERED that the Plaintiff's Motion for Remand is **DENIED AS MOOT**. It is further

ORDERED that Defendant The Patriot League's Preliminary Motion to Dismiss is **DENIED AS MOOT**. It is further

ORDERED that this case shall be **REMANDED** to the Superior Court of the District of Columbia. It is further

ORDERED that this case is **CLOSED**.

SO ORDERED on this 10th day of December, 2015.

REGGIE B. WALTON
United States District Judge

[11] Remand, of course, moots the remaining motions that are pending before the Court. And to the extent that there are any other motions to dismiss that are somehow pending before the Court, but not reflected on the docket, those will also be denied as moot. See Line II (citing Fed. R. Civ. P. 81 for proposition that other motions to dismiss that were previously filed in the Superior Court were transferred to this Court).